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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER ACEVEDO,

Defendant and Appellant.

2d Crim. No. B200258  
(Super. Ct. No. 200615816)  
(Ventura County)

Javier Acevedo appeals a judgment after his conviction of first degree murder (Pen. Code, §§ 187, subd. (a), 31), with special findings that Acevedo committed the offense for the benefit of a criminal street gang. We conclude, among other things, that: 1) substantial evidence supports his conviction of first degree murder, 2) the court did not commit reversible error by not instructing the jury on self-defense, 3) evidence of a prior assault the day before the murder was properly admitted, and 4) admission of gang expert testimony was not error. But the court erred by imposing a parole revocation restitution fine. (*Id.*, § 1202.45.) The fine is stricken. In all other respects, we affirm.

FACTS

On the evening of May 5, 2004, Acevedo drove into a residential neighborhood in Montalvo. The Montalvo street gang claims that area as part of its territory. Acevedo, 20, and his passenger, Rudy Sandoval, 17, were members of the Ventura Avenue gang, a rival to the Montalvo gang.

Acevedo spotted Ryan Briner, 26, walking down the street. Acevedo drove past him, made a U-turn around a cul-de-sac at the end of the street. He then stopped the car, held his foot on the brake and waited. Acevedo and Sandoval got out of the car. Sandoval had a shotgun. He pointed it at Briner's chest.

Jocelyne Rohrback, the Briner's next door neighbor, testified that she heard two gun shots after she saw someone get out of the driver's side of Acevedo's vehicle. She told police that she heard the shots within 30 seconds of seeing that car make the U-turn. At trial, she said that the time interval was "hard to pin down" and it could have been two to three minutes. There was a short pause between the gun shots. After the shooting, she saw Acevedo's car drive off "very slowly." Briner died.

Dr. Janice Frank, the assistant chief county medical examiner, testified that Briner had shotgun wounds to his chest and back. She concluded that the first shot was fired into his chest and the second was to his back. She said that after the first shot, Briner "turned and tried to move away . . . from the gun" before he was shot in the back.

James Roberts, a sheriff's department forensic scientist, testified that the first shot was fired from between three to five feet from the muzzle end of the shotgun. The second shot was fired from a distance of 10 to 16 feet.

Police detective Patrick Stevens testified that he examined the crime scene evidence. Briner had nothing in his hands. There were no knives or other weapons in his pockets or near his body.

Anna Ruiz, Sandoval's girlfriend, testified that after the Briner shooting Sandoval told her that he "had done something really bad." He said he "fucked somebody up really bad or even killed them." A month earlier Ruiz was at friend's house. Acevedo came over and told Sandoval that he wanted him to go with him to Montalvo. Acevedo said he "had gone to a liquor store and there was some Montalvo boy standing out there looking at him funny . . . ." Sandoval went with Acevedo. Ruiz subsequently drove to Montalvo with a friend looking for him because she did not want Sandoval "to get into trouble." She knew that Acevedo had a shotgun.

In the defense case, police detective Bob MacInnes testified that he interviewed Sandoval who initially told him that Acevedo fired the shotgun. Later Sandoval "confessed to being the shooter." In an April 2005 police interview, Sandoval said, "I thought [Briner] was going to do something. Like he came at us like, like (inaudible) was a crazy fool. He didn't give a fuck. And then even when I had it in my hand, it was kind like fucking shit."

Sheriff's detective Danny Lopez testified that he interviewed Sandoval in October of 2006. He told Lopez that Briner "was dogging" Acevedo. Sandoval "wished [Briner] just ran instead of coming towards him." He told Lopez that Briner "had something in his hand, and he wished he knew what" it was. He said "he thought [Briner] might have a knife or gun, so he went back to the car and grabbed the shotgun." He pointed the gun at Briner and shot him because Briner "kept coming towards him."

Acevedo did not testify.

In the prosecution's rebuttal, MacInnes testified that he had talked to Sandoval multiple times prior to September 14, 2006, and Sandoval never claimed that Briner had a knife or a gun. In September of 2006, there was a preliminary hearing. Sandoval was present when MacInnes testified that Acevedo told him that Briner had a knife.

### *The Catalina Street Incident*

On May 4, 2004, Sandoval and Acevedo were in a car which was following Shawn Mickelson's vehicle. Mickelson stopped for a red light. Sandoval, who was a passenger in Acevedo's car, got out, walked up to Mickelson's car and said to Mickelson and his passengers, "What the fuck? Are you guys talking shit?" When the light turned green, Mickelson drove away.

When Mickelson reached Catalina Street, he noticed that someone was following him. He pulled over and stopped. Sandoval got out of Acevedo's vehicle and approached with a shotgun. He pointed it at Mickelson's face. Mickelson pushed the gun away.

Acevedo felt that he had to intervene to assist Sandoval. He came over, grabbed the shotgun away from Sandoval and fired two shots near the front of Mickelson's car. Acevedo and Sandoval drove away.

Acevedo later told police that he took the shotgun away from Sandoval because he thought "something bad was about to happen." He said Sandoval "was getting too close and he was taking his chances."

#### *Acevedo's Statements to the Police about the Briner Shooting*

When the police questioned Acevedo about the Briner shooting, he initially told them that he was not at the crime scene. Later he said he and Sandoval were there. Acevedo said he drove by and Briner was "screaming at us and starts thrown' signs and shit. And I'm thinking like, like what the hell is this guy's problem. You know, I stopped and I got out to try to talk to him and he starts coming at me . . . ." Then Briner pulled a knife "and tried to stab both of us." Briner "was tryin' to do something with his hand. I didn't even see what he had in his hand." Acevedo said he knew that Sandoval had the gun, but he "didn't wanna look" to see where Sandoval shot Briner.

In an interview a couple of weeks later, Acevedo told detectives, "I'm pretty sure [Briner] had a knife." "I'm positive he had it." When a detective asked in which hand Briner held the knife, Acevedo responded, "That's kind of a hard one. I'm-I'm guessing the right one, but then again, I'm thinking the left one. I don't know, he was doing some crazy shit with his hands. [¶] . . . [¶] I just seen some things flashing like (makes whizzing noises), so it was hard to tell."

#### *Gang Expert Testimony*

At trial police officer Ryan Weeks, a gang expert, testified that Acevedo and Sandoval were members of the Ventura Avenue gang. One of their rivals was the Montalvo gang. Acevedo had a history of going into Montalvo gang territory to "gang-bang" because the Montalvo gang was smaller and less dangerous than other area gangs.

The phrase "putting in work," in gang parlance, describes the way younger gang members prove themselves and elevate their stature within the gang. They may do this by committing violent crimes in another gang's territory. That also enhances the

gang's stature because gangs "rely on fear and intimidation within a community. That's how they survive." Older gang members will allow younger ones the opportunity to prove themselves by using a weapon.

In gang culture, Sandoval's conduct at Catalina Street would be considered a humiliation. He "hesitated and failed to act." Another gang member had to take the gun and use it to assert gang authority.

In a police interview, Acevedo said Briner threw gang signs at them with his hands. Weeks said that in gang culture "that is something that two gang members in a car cannot pass up. . . . [¶] They would be expected to confront that person . . . ." They would not drive away.

## DISCUSSION

### *I. Substantial Evidence*

Acevedo contends there is no substantial evidence to support his conviction of first degree murder. He claims Briner was killed as a result of a "spontaneous decision" with "no time to premeditate and deliberate." We disagree.

In reviewing the sufficiency of the evidence, we draw all reasonable inferences in support of the judgment. We do not weigh the evidence or decide the credibility of witnesses. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 10-12.) "[F]irst degree murder requires more than a showing of intent to kill." (*People v. Harris* (2008) 43 Cal.4th 1269, 1286.) There must be deliberation and premeditation. (*Ibid.*)

Acevedo claims that "[t]hirty seconds after [he] stopped his vehicle, witnesses heard gun shots." He argues this left no time for him to premeditate and deliberate. But Rohrback testified that the time interval may have been longer, between two to three minutes. Yet even so, "[t]he process of premeditation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.' . . .'" (*People v. Harris, supra*, 43 Cal.4th at pp. 1286-1287.)

Here the jury could reasonably infer that Acevedo had sufficient time to reflect and his actions were deliberate. From Weeks' testimony, jurors could find that Acevedo and Sandoval entered Montalvo gang territory with a purpose. Sandoval had been humiliated by his inability to use the shotgun at Catalina Street. The next day Acevedo and Sandoval went to a park. Acevedo took the younger Sandoval under his tutelage, and he showed him how to use the shotgun. Sandoval needed to prove that he could violently confront an opponent on rival gang turf to raise his stature within his gang. Weeks testified that in gang culture this is called "putting in work."

Jurors could reasonably infer that when Acevedo and Sandoval spotted Briner, they activated their "putting in work" plan and their actions were calculated. Acevedo drove past Briner and then made a U-turn by driving around a cul-de-sac at the end of the street. He parked his car a substantial distance from Briner. A reasonable trier of fact could find that they were waiting for him to approach them. Rohrback testified that when he stopped the car, the brake lights on Acevedo's vehicle "remained on for quite some time." As Briner approached, the two of them got out of the vehicle. Sandoval had the shotgun.

From the forensic and crime scene evidence, the jury could find that the way the crime was committed also showed premeditation. Briner was shot in the chest from a shotgun blast. The muzzle of that weapon was between three and five feet from the victim. After the first shot, Briner "turned and tried to move away" before he was shot in the back from a distance of 10 to 16 feet. There was a short pause between the two shots. Stevens' testimony showed that Briner was unarmed. Police found nothing in Briner's hands and no weapons at the crime scene.

"The manner of killing-multiple shotgun wounds inflicted on an unarmed and defenseless victim who posed no threat to defendant-is entirely consistent with a premeditated and deliberate murder." (*People v. Silva* (2001) 25 Cal.4th 345, 369; see also *People v. Poindexter* (2006) 144 Cal.App.4th 572, 588 ["The manner of killing, while not an execution-style single shot to the head, could still support a finding of premeditation and deliberation, as defendant quickly fired three shots at the victim, with a

shotgun, from relatively close range"].) Here, the second shot to the back, fired while Briner was mortally wounded and fleeing for his life, supported a finding of a cold and calculated decision to kill. (*Poindexter*, at p. 588.) Jurors could find that it was analogous to an execution-style slaying.

Acevedo told police that Briner was "thrown' signs" at them. After the shooting, Acevedo told a friend that this crime was committed for the gang. He described it as "[a]nother one for the Avenue" and "[o]ne for the team." "Premeditation can be established in the context of a gang shooting even though the time between the sighting of the victim and the actual shooting is very brief." (*People v. Sanchez* (2001) 26 Cal.4th 834, 849.) The evidence is sufficient.

## II. *Self-Defense Instruction*

Acevedo contends the trial court committed reversible error by not giving the jury an instruction on self-defense and imperfect self-defense. He claims that had these instructions been given, the jury could have found voluntary manslaughter. We disagree.

"It is well settled that a defendant has a right to have the trial court, on its own initiative, give a jury instruction on any affirmative defense for which the record contains substantial evidence." (*People v. Salas* (2006) 37 Cal.4th 967, 982.) "[A] homicide is justifiable and noncriminal where the actor possessed both an actual and reasonable belief in the need to defend." (*People v. Stitely* (2005) 35 Cal.4th 514, 551.) "[T]he fear must be of imminent harm. "Fear of future harm-no matter how great the fear and no matter how great the likelihood of the harm-will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury."" (*Ibid.*)

"An unlawful killing involving either an intent to kill or a conscious disregard for life constitutes voluntary manslaughter, rather than murder, when the defendant acts upon an actual but unreasonable belief in the need for self-defense." (*People v. Stitely, supra*, 35 Cal.4th at p. 551.) "The subjective elements of self-defense and imperfect self-defense are identical. Under each theory, the appellant must actually

believe in the need to defend himself against imminent peril to life or great bodily injury.'" (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 82.)

Acevedo notes that he told the detectives that Briner pulled a knife and threatened him. He claims this was substantial evidence for a self-defense instruction.

The Attorney General disagrees and claims *People v. Stitely, supra*, 35 Cal.4th at pages 551-552, is dispositive. There the defendant told the police that the victim he killed had a knife. The trial court did not give a self-defense instruction. The defendant argued that his statement about the victim's knife constituted substantial evidence for the instruction. The Supreme Court disagreed. It noted that the defendant said the victim had a knife, but did not claim that she had threatened him with it. Consequently a self-defense instruction was not required. (*Id.* at p. 552) By contrast, here Acevedo made the statement that Briner pulled a knife "and tried to stab both of us."

Citing *People v. Holt* (1944) 25 Cal.2d 59, 66, the Attorney General argues that Acevedo was not entitled to a self-defense instruction because, by his own account, he and Sandoval were the aggressors. He claims Acevedo admitted that he "confronted Briner" which led to the altercation. But Acevedo notes that he only told the detectives that he "got out to try to talk to" Briner. He said that Briner started the altercation and threatened them with a knife.

Acevedo claims his statements to the police constituted substantial evidence for the instruction. But any arguable claim to self-defense for the first shot ended when Sandoval fired the second. (*People v. Pinholster* (1992) 1 Cal.4th 865, 966 ["right of self-defense does not extend beyond the time of real or apparent danger"]; *People v. Romero* (1999) 69 Cal.App.4th 846, 856; *People v. De Leon* (1992) 10 Cal.App.4th 815, 825 [no substantial evidence for imperfect self-defense instruction where after the altercation defendant was "firing at men who had turned and started to walk away"]; see also *People v. Butler* (2005) 127 Cal.App.4th 49, 61 [first degree murder conviction affirmed and not giving voluntary manslaughter instruction was not error where defendant shot unarmed victim who "was attempting to run from the fight"].)



Yet even if Acevedo is correct that the court erred, the result does not change because any instructional error here is harmless beyond a reasonable doubt. (*People v. Salas, supra*, 37 Cal.4th at p. 984.) Omitting a self-defense instruction is not reversible error where: 1) the claim is based on the defendant's self-serving and inconsistent statements to the police, 2) the uncontradicted crime scene evidence refutes the defense claim that the victim was armed, and 3) the self-defense claims are contradicted by undisputed ballistics and forensic evidence. (*People v. Stitely, supra*, 35 Cal.4th at pp. 551-552; *People v. Hendricks* (1988) 44 Cal.3d 635, 643; see also *People v. Sakarias* (2000) 22 Cal.4th 596, 621 [failure to give lesser offense instruction harmless beyond a reasonable doubt where defense evidence was "at best, extremely weak"].)

Here Acevedo's self-defense claims were contradictory. He initially lied by claiming he was not at the crime scene, and his remaining statements to the police were not consistent. He said he saw a knife, but later he said, "I didn't even see what [Briner] had in his hand" and "it was hard to tell." During questioning he could not identify which hand held the knife nor was he able to describe the weapon. His claim to the police that Briner screamed and aggressively confronted them was refuted by trial testimony. Rohrback said she heard no yelling or other noise from the street until she heard the gun shots.

Moreover, Sandoval did not claim that Briner had threatened them with a knife or had a weapon in his April 2005 police interview. He did not claim he was acting in self-defense when he confessed to his girlfriend shortly after the shooting. Sandoval said he fired the second shot as Briner was moving towards him. But the uncontradicted medical, ballistics and forensic evidence refuted that claim.

Briner was shot in the back after he was mortally wounded from Sandoval's first shot. He was trying to flee and the undisputed crime scene evidence shows that he was unarmed. There was no legal justification for shooting him when he was retreating and at such a distance that he posed no threat to anyone. (*In re Christian S.* (1994) 7 Cal.4th 768, 783 [imperfect self-defense not available unless defendant was in actual fear of imminent harm]; see also *People v. Rogers* (2006) 39 Cal.4th 826, 884 [imperfect self-

defense instruction unnecessary where defendant had a gun and the victim was unarmed]; *People v. Beyea* (1974) 38 Cal.App.3d 176, 190 [self-defense claim properly rejected where defendants used excessive force against victim who was "at the mercy of" defendants]; *People v. Perez* (1970) 12 Cal.App.3d 232, 236 [no justification for use of force where attacker has withdrawn]; *People v. Evans* (1969) 2 Cal.App.3d 877, 882 [no claim to self-defense where armed defendant pursues fleeing victim]; *People v. Keys* (1944) 62 Cal.App.2d 903, 916 [self-defense not applicable to defendant who shot fleeing victim in the back].)

To counter the prosecution's position that the killing was deliberate, Acevedo's trial counsel told jurors that Sandoval acted alone and Acevedo did not know what Sandoval would do. The trial court instructed jurors that to convict Acevedo as an aider and abettor they had to find that he knew Sandoval "intended to commit the crime," that Acevedo intended to help him and that he in fact provided assistance. By their verdict, jurors necessarily rejected Acevedo's claims. Acevedo and Sandoval had a pattern of confronting or pursuing people to assert their gang's authority. Weeks' testimony showed their motive for a planned attack on Montalvo turf. Acevedo admitted to a friend that the shooting was gang related and "[o]ne for the team."

Acevedo's trial counsel told the jury that Briner was the aggressor and the shooting was a spontaneous reaction to his conduct. The court instructed jurors, "If a person kills with a legally valid excuse or justification, the killing is lawful and he or she has not committed a crime." (CALCRIM No. 500.) It said, "Every crime or other allegation charged in this case requires proof of the union, or joint operation, of act and wrongful intent." (CALCRIM No. 251.) By their special circumstance finding that the murder was committed to benefit their gang (Pen. Code, § 190.2, subd. (a)(22)), jurors necessarily rejected Acevedo's claims that the killing involved mitigating circumstances or was provoked by Briner's aggression.

Acevedo's trial counsel told the jury that this was "[a] decision to kill made rashly . . . Impulsively." The trial court instructed jurors, "A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated." By

their verdict and special findings, jurors found the crime involved deliberation and premeditation. They rejected second degree murder. "The jury's verdict finding defendant guilty of the first degree murder . . . implicitly rejected defendant's version of the events, leaving no doubt the jury would have returned the same verdict had it been instructed regarding imperfect self-defense." (*People v. Manriquez* (2005) 37 Cal.4th 547, 582; *People v. Mayfield* (1997) 14 Cal.4th 668, 779.)

### III. *The Catalina Street Incident*

Acevedo contends the court erred by admitting evidence about the Catalina Street shooting. We disagree.

We review rulings on the admissibility of evidence to determine whether there was an abuse of discretion. (*People v. Memro* (1995) 11 Cal.4th 786, 864.) Evidence of a defendant's conduct on a prior occasion may be admitted to prove the defendant's motive or intent. (*Ibid.*; Evid. Code, § 1101, subd. (b).) "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) Evidence of prior bad acts is also admissible to prove opportunity, a plan of action or knowledge. (*People v. Miller* (2000) 81 Cal.App.4th 1427, 1447.) "[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish . . . the presence of the normal, i.e., criminal, intent accompanying such an act . . . ." (*Ewoldt*, at p. 402.)

Here the Catalina Street incident was properly admitted because it showed the motive for the Montalvo shooting. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 15.) Sandoval's inability to handle the shotgun at Catalina Street was a humiliation which led to his need to prove himself when he and Acevedo entered Montalvo territory. The two incidents were causally connected and close in time. Both involved a similar pattern, the same duo, the same driver, the car, the shotgun, and the same goal of asserting their gang's authority through gun violence. Acevedo claims the evidence of the prior shooting incident was prejudicial. But its probative value was high and this relevant

evidence on motive substantially "exceeded its prejudicial effect." (*People v. Pertsoni* (1985) 172 Cal.App.3d 369, 376.)

#### IV. *Gang Expert Testimony*

Acevedo contends that the trial court erred by admitting Weeks' testimony about his gang and his motives for entering Montalvo gang territory. He claims Weeks' testimony "usurped the jury's fact-finding function."

At trial, Acevedo did not object to this testimony. He consequently waived this issue. (*People v. Ward* (2005) 36 Cal.4th 186, 211.) But even on the merits, the result is the same.

The standard of review regarding the admission of gang evidence is whether the trial court abused its discretion. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.) "[I]t is proper to introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent." (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1518.) "[E]vidence describing gang colors, behavior and areas of influence . . . [may have] a 'tendency in reason to prove' [citation] that defendant had a motive" to shoot a rival to the gang. (*People v. Williams* (1997) 16 Cal.4th 153, 194.)

Expert testimony on gang culture, habits and psychology does not usurp the jury's fact finding function. Such matters are beyond the common experience of jurors. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.)

Here Acevedo has not shown an abuse of discretion. Weeks' testimony explained the motive behind the shooting of Briner. The testimony about the gang, its culture and the concept of "putting in work" showed why Acevedo and Sandoval entered Montalvo gang territory. It was directly tied to relevant issues and involved matters beyond the common experience of jurors. "[N]othing bars evidence of gang affiliation that is directly relevant to a material issue." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 588.)

V. *The Parole Revocation Restitution Fine*

Acevedo notes that the trial court imposed a parole revocation restitution fine of \$10,000. He claims this was unauthorized. The Attorney General agrees. They are correct.

Penal Code section 1202.45 authorizes the trial court to impose a "parole revocation restitution fine" in "every case where a person is convicted of a crime and *whose sentence includes a period of parole . . .*" (Italics added.) But Acevedo's sentence did not include a period of parole. He was sentenced to life without the possibility of parole. Consequently this fine must be stricken.

We have reviewed Acevedo's remaining contentions and conclude that he has not shown any other reversible error.

The parole revocation restitution fine is stricken and we order the abstract of judgment to be corrected. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Herbert Curtis III, Judge  
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